SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 180.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

SPENCER MELTON, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

JAMES W. CLAY,
Counsel for Defendant in Error.

WM. J. COX,
J. F. CLAY,
Of Counsel.

(21,231.)

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LOUISVILLE & NASHVILLE RAILROAD COMPANY,
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I.

In the reply brief of the plaintiff in error, counsel attempts to show that the "due-process" clause of the Fourteenth Amendment was pleaded and relied upon in the State court. We think on counsel's own showing, according to the quotations from the record contained in the reply brief, this question is settled. The very portions of the record quoted by counsel, refer to no part of the Federal Constitution, except the equal-protection clause. A general plea that a statute is in conflict with a certain article or amendment of the Con-

stitution may be sufficient to search the record with the whole article or amendment, but under the well-recognized rule of construction that the enumeration of particular powers, or the pleading of particular facts, exclude all others, the "due-process" clause is not involved.

As shown at pages 3 and 4 of the reply brief, the plea in this case was, "That section 1, article 14 of the United States Constitution provides that no State shall deny to any person within its jurisdiction *the equal protection of the laws* * * *" Defendant says that in so far as the terms of said Indiana statutes are made to apply to the facts of this case they are unconstitutional and void; that they are violative of the Constitution of Indiana, and are violative of *said* provision of the United States Constitution." The defendant has already said what provision is relied on when it pleaded: "That section 1, article 14, provides that no State shall deny to any person within its jurisdiction the equal protection of the laws." If the pleader had relied upon the whole of section 1 of the Fourteenth Amendment, he might have stood upon the whole of that section, but when he pleads that the part of section 1, upon which he relies is only that part which provides, "That no State shall deny to any person within its jurisdiction the equal protection of the laws," then the particular enumeration of this part excludes all other parts of this section.

Again, it appears at page 4 of the reply brief, that in the motion for a new trial filed by the defendant, it is stated that the Indiana statute so far as applicable to the facts of this case, "is violative of the Constitution of the State of Indiana and of section 1, article 14 of the Constitution of the United States, *which guarantees to the defendant the equal protection of the law.*" Nowhere in the petition for rehearing filed in the Court of Appeals of Kentucky is the "due-process" question mentioned, and nowhere in the opinion of the Court of Appeals is the "due-process" question mentioned. Throughout the petition for rehearing, and throughout the

opinion of the Court of Appeals of Kentucky, the sole and only constitutional question mentioned, commented upon, or suggested, is the single one growing out of the equal-protection clause of the Constitution.

We submit, therefore, that the "due-process" question is not before the court.

II.

There can be no doubt of the proposition that this act, according to its terms, embraces Melton and the work at which he was engaged. No words could be employed to more clearly express this fact. There is a legal presumption that no legislative body of any State will knowingly pass an unconstitutional act in whole or in part. When an act of the legislature comes before a court, every presumption is indulged in favor of its validity *in toto*. If a part is valid and a part invalid and the act be severable, unless there is expressly or impliedly an intention to the contrary shown, it is the policy of the law to carry out the will of the legislature, constitutionally expressed, and to enforce the valid part.

It is not necessary to enter into a discussion of the question as to whether this statute of Indiana is valid, as applied to "accountants, stenographers, typewriters," etc., because, in this case, it is not applied to any of these employees. It is applied, by the Court of Appeals of Kentucky, to a member of a construction crew, engaged in carpenters' work in building a coal-chute for the railroad company on the railroad tracks. And we insist now, as we insisted in our original brief, that the only question properly before this court is whether or not this statute can be constitutionally applied in this case, so as to render it not in conflict with the equal-protection clause of the Federal Constitution.

We contend that there is a marked distinction between the construction of a valid act, containing language susceptible of more than one construction, and restricting an

act, too broad in its terms, so as to bring it within constitutional limits. The one presents a simple question of construction, while the other presents a constitutional question. The question presented here is not simply one of the construction of a statute containing language having a doubtful meaning, and susceptible of more than one construction, but it is a question of the constitutionality of the statute as applied under the equal-protection clause of the Federal Constitution. This is a question upon which the Kentucky court has concurrent jurisdiction with the Federal courts, subject to review by the Supreme Court of the United States; but, as we stated in our original brief, it is a question which comes before this court for its independent consideration, regardless of how the Supreme Court of Indiana may have decided the same.

We take the position with the utmost confidence, that the statement of counsel that the decisions of the Indiana Supreme Court (if they had been properly pleaded and proved) "is conclusive of the proposition that the statute is unconstitutional if not so limited by construction as to exclude Melton from its benefits," as stated at page 24 of the reply brief; and the argument,—"We are only concerned with the meaning of the statute of Indiana which the court of last resort of that State has felt compelled to give it, in order to uphold it as a constitutional exercise of legislative power,"—as stated at page 25 of the reply brief, and all other arguments and statements of like import contained in the reply brief, as well as in the original brief of plaintiff in error, are predicated upon a false premise and are, consequently, fallacious conclusions. They are all based upon the premise that the Indiana Supreme Court had held that this statute, according to its terms, could not be construed to apply to cases of a certain character, when, as a matter of fact, that court has only held that, however broad its terms may be, the statute could not be *constitutionally* applied to certain cases, and that to render it constitutional it would restrict its broad

language within bounds which would bring it within the limitations of the United States Constitution.

The limitations upon legislative action of the various States, so far as Federal control is concerned, are embraced in the Federal Constitution, and whenever State laws come into conflict with that Constitution they must give way. If, however, instead of deciding that this Indiana statute, as applied to certain cases, was violative of the Federal Constitution, the Supreme Court of Indiana had held that it was not repugnant to that instrument, would it be argued that this court was bound by that decision? Most certainly not. In either event the question is a constitutional one and comes to this court for its independent judgment.

If this court should accept as correct the argument that the decision of the Supreme Court of Indiana in some other case is conclusive upon this court, or that it was bound to accept the decision of the Supreme Court of Indiana on the constitutional question, and should say that it was on this account only bound to declare the statute as applied invalid. then this decision would not be the judgment of this court, but the judgment of the Supreme Court of Indiana. The very next day a case might come before this court on writ of error to the Supreme Court of Wisconsin, presenting a case of exactly the same character, except in this, that the Wisconsin court held, as it has done, that practically the same statute could be constitutionally applied in Wisconsin. Here, then, would be a case where the court could unquestionably exercise its independent judgment. Now, suppose the court should in this last case hold that, according to its independent judgment the same statute, or one identical with it in terms, could be constitutionally applied in Wisconsin. The manifest result would be that in Wisconsin the Fourteenth Amendment would mean one thing, and in Indiana an entirely different thing.

One of the main objects of the framers of our Constitution, in the establishment of a Supreme Federal Court, was

to obtain uniformity in the administration of the Federal Constitution and laws.

> "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising under the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."
>
> The Federalist, No. LXXX.

The Supreme Court of the United States must have final and independent jurisdiction of questions under the Federal Constitution, in order to avoid the endless contradiction and confusion which would otherwise follow.

If the decision of the Supreme Court of Indiana in the Kinney case, or in the Foland case, are taken as decisions construing or applying the statute in question, they have no binding force for the reasons shown in our original brief,—they were neither pleaded or proved; and if they are taken as decisions upon the constitutional question, they have no binding force for the reasons herein stated. The question, therefore, narrows down to the simple one, as to whether the Indiana statute as applied by the Court of Appeals of Kentucky, denies to the plaintiff in error the equal protection of the law.

III.

Since the decision of this case by the Kentucky Court of Appeals the question of employers' liability has been before several of the State courts of last resort. In two of these cases statutes were upheld under constitutional attack similar to the attack in this case.

In Kiley *vs.* Chicago, M., etc., R. Co., 119 N. W. R., 311,

decided by the Supreme Court of Wisconsin, January 5, 1909, the statement made by the court, is as follows:

> "Plaintiff brings this action for the recovery of the damages alleged to have been suffered by reason of the loss of an eye and the physicians and nursing bills incurred as the result of an injury, which he claims was due to the negligent and careless manner in which other employés of the defendant performed their duties. On July 2d, 1907, plaintiff was engaged with other employés of the defendant in the construction of a wire fence along the defendant's right of way. The company's foreman had directed them to take certain wire off an old fence. The wire was held in place by staples and these were to be pulled out. Plaintiff was advancing toward a post with a hammer, intending to pull out the staples, when two of the other employés, by pulling upon the wire, pulled a staple out of the post. The staple flew into the air, struck plaintiff in his right eye and blinded him. The action is brought under chapter 254, page 495, laws 1907. The court overruled defendant's demurrer to the complaint."

After giving the above statement of facts, the court said:

> "Plaintiff's right to recover on the alleged cause of action is founded on the provisions of section 1816, St. 1898, as amended by chapter 254, page 495, laws 1907. There is no claim that the facts alleged in his complaint constitute a cause of action against the defendant at common law or under section 1816, St. 1898, as it stood prior to its amendment by chapter 254, page 495, laws 1907. The lower court sustained the complaint upon the ground that section 1816, St. 1898, in its amended form is valid. The defendant avers that the amended statute creates liabilities and imposes burdens which are forbidden by sections 1, 9, 13, 22, article 1 of the State Constitution, and by the Fourteenth Amendment to the Federal Constitution. The alleged obnoxious provisions of the statute were added by the amendatory act, which is embraced in chapter 254, page 495, laws 1907. It is, therefore, contended, if this act is invalid, that the provisions

of section 1816, St. 1898, as it stood prior to such amendment, are still in force as the law on the subject. The provisions of chapter 254, page 495, laws 1907, are assailed as invalid upon several grounds.

"It is first contended that the enacting part of this chapter and subdivisions 1, 2, and 9 must be read together and that when so considered, the act is unconstitutional because it denies to railroad companies equal protection and due process of law. These provisions are:

" 'Every railroad company shall be liable for damages for all injuries, whether resulting in death, or not, sustained by any of its employés, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employé.

" '1. When such injury is caused by a defect in any locomotive, engine, car, rail, track, roadbed, machinery, or applicance used by its employés in and about the business of their employment.

" '2. When such injury shall have been sustained by any officer, agent, servant or employé of such company, while engaged in the line of his duty as such, and which such injury shall have been caused, in whole or in greater part by the negligence of any other officer, agent, servant or employé of such company in the discharge of, or by reason of failure to discharge his duty as such.

" '9. The provisions of this act shall not apply to employés in shops and offices.' "

"* * * We must then determine whether the legislature by this classification has violated accepted rules of classification.

"The statute imposes liabilities on railroad companies for all injuries sustained by any of its officers, agents, servants or employés, while in the performance of their duties, which may be caused, in whole or in greater part by the negligence of other officers, agents, servants or employés, those working in shops and offices being excepted. It is strenuously urged that the imposition of these burdens and liabilities on railroad companies only as a class violates their right to the equal protection of the law, and that, being a classification based upon the character of the corpora-

tion, it furnishes no reasonable distinction or necessity for separating them into a class for purposes of legislation. To ascertain wherein distinction is made by the legislature between railroad companies and individuals and other corporations and associations, we must consider the nature and object of the regulation, as well as the provisions prescribing rules for the regulation of railroad companies as a class. The context of this statute shows that railroad companies are separated into a class by legislative regulation respecting their liability to their employés for injuries caused by its negligence or the negligence of other employés in the course of their employment. Is the railroad business distinguished in character from all other businesses, so as to justify special regulation of it, as is done by this law? This we think must be answered in the affirmative. The business of operating a railroad differs from others in its nature, in its relation to the public, and in the peculiar dangers and hazards as regards it employés and the public. These characteristics clearly distinguish the railroad from any other business, and call for regulation to meet the conditions and exigencies peculiar to it, and such as are wholly inapplicable to any other business. The object of the law is to obtain reasonable protection to its employés and to secure the safety of the public. The legislature seeks to attain this through the imposition of those unusual burdens and liabilities, thereby securing from railroad companies the exercise of a degree of care, in the selection of competent and careful employés, for the conduct of the business, commensurate with the hazards and dangers to its employés, and the insecurity of the public. Securing the safety of the public in addition to the protection of its employés, is an important feature which distinguishes a railroad business from any other, and is an important consideration in separating railroads into a class by themselves for legislative purposes."

The court then cites the Mackey, Tullis, Herrick, Pontius and Pierce *vs.* Van Dusen, Callahan, Montgomery, Miller (Ga.), Matthews, and The Employers' Liability cases, all cited and referred to in our original brief. It then cites the

case of Ditberner *vs.* Ry. Co., 47 Wis. 138, 2 N. W. 69, showing that in that case it rejected the doctrine of Deppe *vs.* Ry. Co., 36 Iowa, respecting the proper basis of classification, and it also recited it in the case under consideration. It then treats the exception of shop and office employés, and holds it was with the legislature to say whether they should or not be included, and there were reasonable grounds for taking them out of the class.

And then, at another place, the court said:

> "It is manifest from these adjudications that the object of the law, in creating these liabilities is a subject of police regulation, not only for the benefit of employés, but also for the protection of life, person and property, and therefore it has its reason and foundation in public necessity and policy."

In Chesapeake & O. R. Co. *vs.* Hoffman, 63 Southern Rep., 432, the Supreme Court of Appeals of Virginia, January 14, 1909, held the Virginia statute was constitutional and applied it to a case where a crew of carpenters were engaged in removing rotten timber from a railroad pier, during the course of which work and through the negligence of fellow-servants, the timbers where plaintiff was at work fell, and he was thrown to the ground a distance of 30 feet, and injured.

The Virginia statute is different from some of the other statutes, and applies to every employé of a railroad company, engaged in the physical construction, repair or maintenance of its road-bed, or any structure connected therewith.

That court said:

> "But it is said that if section 162 of the Virginia Constitution applies to the facts of this case, it contravenes the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws.
>
> "It is conceded that the legislature may classify

> legislation, but that the classification must be upon a natural and reasonable basis."

Several authorities are then reviewed and the court said:

> "We think that the provision in our Constitution and the act of the legislature putting it into operation, are not in conflict with the Constitution of the United States."

IV.

Attached, as an appendix to the original brief of plaintiff in error is the dissenting opinion delivered in this case by Judge Barker. It is not a part of the record, and if it were, it has no binding force. To show, however, how the writer of that opinion looks upon railroad work generally, we quote the following words from an opinion written by the same judge, and handed down by the Court of Appeals of Kentucky April 19, 1910, in the case of Fuller *vs.* Illinois Central Railroad Company:

> "In a general sense it may be affirmed that all railroad work is more or less dangerous."

The case just quoted from has not yet been published, but is marked by the court to be reported, and the words quoted were used in deciding a case where the employé was not injured in train service, or in railroad operation, within the definition of that term given by opposing counsel.

After reading the original brief, as well as the two reply briefs of the plaintiff in error, we again submit and respectfully ask that the judgment of the Court of Appeals of Kentucky be affirmed.

JAS. W. CLAY,
Counsel for Defendant in Error.

WM. J. COX,
J. F. CLAY,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1935

No. 100

THE LOUISVILLE & NASHVILLE RAILROAD CO., Petitioner,

vs.

SPENCER MELTON, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON HIS MOTION TO DISMISS AND AFFIRM

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Gibson Press, Hendersonville, Tenn.

Supreme Court of the United States

OCTOBER TERM, 1908.

NO. 435.

THE LOUISVILLE & NASHVILLE RAILROAD CO. - Plaintiff in Error

vs.

SPENCER MELTON - - Defendant in Error

BRIEF OF DEFENDANT IN ERROR ON HIS MOTION TO DISMISS AND AFFIRM.

The grounds upon which the motion to dismiss the writ of error, and affirm the judgment of the Kentucky Court of Appeals is based, precludes an argument thereof. Our object in submitting this brief, is only to place before the Court a statement of the law and facts.

The statement of the facts and object of the motion as contained in the motion itself, is as follows:

> "'The Defendant in Error, Spencer Melton, was in the employ of the Plaintiff in Error, the Louisville &

Nashville Railroad Co. as a member of a construction crew. His duties took him from place to place on the railroad company's line, as ordered by his foreman. On the 21st day of March, 1905, Melton was engaged with the crew, of which he was a member, and under his foreman, in the construction of a coal tipple or chute for the railroad company, and on its line of road. This tipple or chute was being built by the railroad company, so as to connect with the mine of the Ingle Coal Co. to enable the railroad company to coal its freight and passenger engines. The bents, to be used in the chute, were framed up before their erection and weighed about 1,200 pounds. They were elevated to their position by means of block and tackle operated by the crew. The diagram between pages 138 and 139 of the printed record, will enable the Court to get a clear conception of the plan or operation.

"Figure 2, on the diagram, is a chain fastened around a square timber, in which is hitched the block and tackle. This chain was procured by the foreman of the crew, and he ordered it to be used to make the 'hitch or tie'; it was a common iron lock chain, such as is used on farm wagons, composed of links about three inches long, and made of bar iron, five-sixteenths of an inch in diameter. The evidence on Melton's behalf shows that this chain was unsuitable and unsafe for the purpose for which it was used, even if it had been a perfect chain of its kind; and it shows further that it had a defective weld, which could have been discovered if it had been properly inspected by the foreman before he ordered its use. After the block and tackle had been connected up, the bent was raised by the power of the men applied at figure 1. Shortly before the bent reached the heighth shown in the diagram the foreman ordered Melton to, and he did take his stand at the place shown by the figure 5, to prop the bent up as it was being raised, and to keep it from

swerving or swinging out of line. Under these conditions and while the bent was being raised by the power mentioned, the defective weld in the weak chain used, parted, and the bent fell upon Melton, and injured him.

"At the time of his injury, Melton was a resident of Hopkins county, Ky., but was injured in Vanderburg county, Ind. This action was brought on the 15th of August, 1905, under the Employers' Liability Statute, admitted to be in force in that State. He secured a verdict and judgment in the Circuit Court of Hopkins county, Ky., for the sum of $22,000.00; this judgment was affirmed by the Court of Appeals of Kentucky, and the railroad company brings the case to this Court on a writ of error to the Court of Appeals of Kentucky.

"The plaintiff in Error, according to its assignment of error, claims that the Indiana Employers' Liability Statute, as construed and applied by the Court of Appeals of Kentucky, is violative of section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives the Plaintiff in Error of its property without due process of law, and denies to it the equal protection of the law; and further that the construction and effect given to the Indiana Statute by the Court of Appeals of Kentucky, is in conflict with the construction and effect given to it by the Supreme Court of Indiana.

"So much of the Indiana Statute in question as has any bearing on the questions here involved, is as follows:

" 'An act regulating liability of railroads (and other corporations, except municipal) for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state: Provided further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any man-

ner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Approved March 4, 1893.)

" 'Section 1. Be it enacted by the General Assembly of the State of Indiana, that every railroad (or other corporation except municipal) operating in this state, shall be liable in damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

" 'First: When such injury is suffered by reason of any defect in the condition of ways, works, plants, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such ways, works, plant, tools or machinery in proper condition.

" 'Second: Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform and did conform.'

"The claim that the act, as applied to this case violates the Federal Constitution is directly raised by the pleadings in the case, and is directly passed upon by the Court of Appeals of Kentucky, and the constitutionality of the act is upheld. It is therefore admitted that this Court has jurisdiction of the case.

MOTION.

"The Defendant in Error, now comes and moves the Court to dismiss the writ of error and affirm the judgment of the Court of Appeals of Kentucky, with damages and costs, notwithstanding the record shows this Court has jurisdiction upon the following grounds:

"1st. It is manifest the writ of error was sued out for delay only.

" 2nd. The question on which the jurisdiction de-

pends is so frivolous as not to need further argument."

This Court is not, of course, bound by this statement, but it will, as we understand the law, accept as true the conclusion of facts as found by the State Court, to which we hereafter refer. For the purpose of this motion, we invite the attention of the Court to the following portion of the record, the references being to the printed transcript:

1st. Appellant's Petition for Re-hearing filed in the Court of Appeals of Kentucky, and copied in the record at pages 147-161. Here may be found a statement of the position of the Plaintiff in Error.

2nd. Appellee's Response to the Petition for Re-hearing copied at pages 164-171, containing a presentation of the position of the Defendant in Error.

3rd. The original opinion of the Kentucky Court of Appeals, copied at pages 142-146 of the record; and the response of the Court of Appeals to the Petition for Re-hearing, delivered by Judge Hobson, at page 173 of the record. These two opinions contain in very brief form, the conclusions of law and fact as found by the lower court, and also a full citation of the authorities sustaining the conclusions of the Court of Appeals of Kentucky.

If the Indiana Statute, upon which this action is predicated, had never been before this Court, and the question of its constitutionality had never been presented to, or passed upon by this Court, then perhaps it could not be said that the writ of error was taken for delay, or that the ground upon which the jurisdiction of the Court depended was frivolous. If, however, this Court has frequently passed upon and upheld similar statutes, and has in express terms, in a case where the same question was fairly presented, passed upon and upheld the identical statute

in question, then it seems to us this motion should be sustained, upon the grounds set forth therein.

"The times have been
That, when the brains were out, the man would die,
And there an end."

The time is now, when as said by the Supreme Court of Georgia in a case involving this very question, "It might be well for the profession to recognize with reference to some matters, at least, they are so well established as, upon the doctrine of *stare decisis,* to be beyond further controversy." (Georgia, etc., R. Co. vs. Hicks, 22 S. E. R., 613.)

The proposition that the Indiana Statute in question was violative of the 14th Amendment to the Constitution of the United States, was first presented to the Supreme Court of Indiana, in the case of Pittsburg C. C. & St. L. R. Co. vs. Montgomery, 152 Ind., 1. It was there held that, as to railroad companies, the statute was valid; that it was severable, and even though it might be invalid as to "other corporations," yet if valid as to railroad companies, the defendant in that action being a railroad company, could not raise that objection.

In a later case, Pittsburg, etc., R. Co. vs. Lightheiser, 78 N. E., 1033, the constitutionality of the act as applied to railroads was again raised, upon the ground that the act applied to "railroad *corporations*" only, and not to non-corporate railroads, and for that reason it was claimed to violate the 14th Amendment. The Supreme Court of Indiana, however, held that the act applied to all railroads, corporate as well as non-corporate, and again upheld the validity of the act.

In a still later case, Bedford Quarries Co. vs. Bough, 80 N. E., 529, the Supreme Court of Indiana held that while as to railroads the statute was constitutional, as to "other corporations" it was not constitutional, because non-corporate employers, in the same class were not included in the act.

In Pittsburg, etc., R. R. Co. vs. Ross, 80 N. E., 845, decided after the Bedford Quarries case was decided, the Supreme Court of that State again held the statute constitutional, as applied to railroads.

In the case of Tullis vs. Lake Erie & Western R. Co., 175 U. S., 348, the same question was presented to this Court, viz: That the identical Indiana Statute here involved was violative of the 14th Amendment. That case came before this Court on a certificate from the United States Circuit Court of Appeals for the Seventh Circuit. The certificate only disclosed the fact that the injured person was in the employ of the company, was injured by the negligence of a fellow servant while engaged in such employment, and that the employer was a railroad company. The question certified and submitted to this Court was, "Whether the statute is valid, or violates the 14th Amendment of the Constitution of the United States." This Court reviewed the decision of the Supreme Court of Indiana in the Montgomery case, *supra*, held that, as the Indiana Court had construed the act to be severable, and thus severed, applied it to railroads, this Court would follow that construction, and that thus construed and applied, the statute was valid. The opinion was delivered by Mr. Chief Justice Fuller, and among other things it was said:

> "Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the 14th Amendment." (Citing numerous cases.)

The Missouri Employers Liability Statute applies only to railroads, and was upheld by this Court in the case of St. Louis M. B. T. R. Co. vs. Callahan, 194 U. S., 628. The case was here on a writ of error to the Supreme Court of Missouri, and was disposed of by this Court by the following memorandum opinion:

"Judgment affirmed with costs, on the authority of Tullis vs. Lake Erie & W. R. Co., 175 U. S., 348-351, and cases cited."

The opinion of the Supreme Court of Missouri in the same case shows the facts in that case were as follows:

> "The defendant's railroad crosses Ferry street in the city of St. Louis by an overhead bridge, which is some 50 feet above the level of the street. The plaintiff was a member of a section gang that was engaged in repairing the railroad by taking out old ties and putting in new ones. When the old ties were taken out they were thrown down onto Ferry street, instead of being carried away. The plaintiff was stationed on Ferry street to warn passers by of the danger, and to remove the ties that were thus thrown upon the street. * * * While so engaged in such work, a small child appeared on Ferry street, and was in a place of peril. The plaintiff went to her, and, while engaged in removing her, the gang on the bridge threw a tie down on the street, which struck the plaintiff on the leg, and injured it so that it had to be amputated."

The precise question presented by Plaintiff in Error here was involved in the Callahan case, and decided by the Supreme Court of Missouri, and by this Court, against it.

Upon the queseion as to whether the Indiana Supreme Court would have given the statute in question the same construction and application given by the Court of Appeals of Kentucky, in this case, we cite the case of Indianapolis St. Ry. Co. vs. Kane, 80 N. E., 841, where the Supreme Court of Indiana applied the statute in question to a case in which the facts, as stated in the opinion of the Court, were as follows:

> "May 11th, 1899, the Central Avenue bridge over Fall creek, in the city of Indianapolis, broke and fell while the gravel train of appellant was passing over it. Trackmen were ordered to the bridge to make repairs,

among them the appellee, by defendant's roadmaster, who was thereto duly authorized by the defendant. Arriving at the bridge late in the afternoon, it was found that the east of the two tracks over the bridge was suspended from pier to pier, holding with it that part of the bridge that was fastened to the ties. Footmen were passing over the suspended structure, which being manifectly dangerous, it was decided to put a prop, or pillar, under each rail, midway between the piers to relieve *temporarily, the danger to passing footmen.* Two heavy timbers were brought, a footing prepared, and one piece raised to an upright position and forced into place under the west rail, under the direct supervision of the defendant's roadmaster. The latter, when the first timber was placed, ordered the plaintiff to clear a place for another like prop under the east rail. While engaged in obeying the order, the timber that had just been set fell, and inflicted upon the appellee the injuries for which he sues."

The case of Baltimore & Ohio, etc., R. Co. vs. Walker, 84 N. E., 730, decided by the Appellate Court of Indiana, while not a decision of the Supreme Court of that State, yet it throws light upon the construction and application given to this Statute by the Indiana Courts. In that case the Court held the statute applied, where a railroad section hand was struck by slivers thrown from a defective chisel used by other employes in cutting bolts, holding a frog in place.

We ask the Court in considering this motion to bear in mind the following pertinent paragraph, in the opinion of the Court of Appeals of Kentucky, delivered in this case, the italics being our own:

"It is earnestly insisted that while the act is constitutional under these rulings as to those operating a railroad it can not be held constitutional as to a carpenter; that the state may not establish a rule for carpen-

ters in the service of a railroad and another rule for carpenters in the service of other people. We are unable to see the force of this distinction. A railroad can not be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges because the engines cannot be operated without coal. *The construction of a coal tipple is therefore essential to the operating of a railroad.* As has been well said, the Legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail and an act regulating railroads violates no constitutional provision because it is made to apply only to rail roads."

To further show how untenable and frivolous is the position of the Plaintiff in Error, that the Indiana Statute in question, as construed and applied by the Court of Appeals of Kentucky, is violative of the 14th Amendment, we cite the cases given below. All of them were cited in our original briefs in the Court of Appeals of Kentucky and most of them are cited by that Court in the opinion in this case:

Kansas, etc., R. Co. vs. Pontius, 157 U. S. 209.

Missouri P. Ry. Co. vs. Mackey, 127 U. S., 205.

Missouri P. Ry. Co. vs. Humes, 115 U. S., 512.

Minneapolis, etc., R. Co. vs. Herrick, 127 U. S., 210.

Minnesota Iron Co. vs. Kline, 199 U. S., 593.

W. W. Cargill & Co. vs. Minnesota, *ex rel,* R. & W. Commission, 180 U. S., 452.

Minneapolis, etc R. Co. vs. Emmons, 149 U S., 364.

Magoun vs. Bank, 170 U. S., 200.

Barbier vs. Connolly, 113 U. S., 27.

Schoolcraft's Admr. vs. L. & N. R. Co., 92 Ky., 233.

Chicago, etc., R. Co. vs. Stahley, 62 Fed. R., 363.
Pierce vs. Van Dusen, 78 Fed., 693.
Kane vs. Erie Ry. Co., 133 Fed., 681.
Edge vs. Electric Ry. Co., (Mo.), 104 S. W., 90.
Railroad Co. vs. Ivey, 73 Ga., 504.
Railroad vs. Miller, 90 Ga., 571.
Railroad vs. Hicks, (Ga.), 22 S. E., 613.
Campbell vs. Cook, 80 Texas, 630.
Railroad Co. vs. Mohrmann (Texas), 91 S. W., 1090.
Sherman vs. Railroad Co., (Texas), 91 S. W., 561.
Railroad Co. vs. Carlin, 111 Fed. R., 777.
Same vs. Same, 189 U. S., 354.
Hancock vs. Railroad Co., (N. C.), 32 S. E., 679.
Rutherford vs. Railroad Co. (N. C.), 35 S. E., 136.
Mott vs. Railroad Co. (N. C.), 42 S. E., 601.
Sigman vs. Railroad Co. (N. C.), 47 S. E., 420.
Nicholson vs. Railroad Co. (N. C.), 51 S. E., 40.

We ask the Court to dismiss the writ of error, and affirm the judgment of the Kentucky Court of Appeals, with damages and costs.

Respectfully submitted,
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